

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARL D. FANNING and U.S. POSTAL SERVICE,
POST OFFICE, Birmingham, AL

*Docket No. 03-29; Submitted on the Record;
Issued May 23, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error; and (2) whether appellant is entitled to more than a three percent permanent impairment for which he received a schedule award.

This case is on appeal to the Board for the second time.¹ In the first appeal, the Board affirmed the Office's December 16, 1996 and May 5, 1997 decisions, finding that the Office properly determined that appellant did not establish that he sustained a recurrence of disability on August 12, 1996 causally related to the October 19, 1995 employment injury. The Board found that the record did not contain any rationalized medical evidence explaining how appellant's cervical disc herniation resulted from the October 19, 1995 employment injury, which was accepted for a herniated L5-S1 disc.

On February 12, 2001 appellant sought continuing disability from November 5, 1999 "through the present."

Appellant submitted progress notes dated from January 31, 1997 through November 3, 1998 from his treating physician, Dr. Michael G. Gibson, a Board-certified orthopedic surgeon, documenting treatment of his neck and back. Appellant underwent a lumbar diagnostic blockade on April 23, 1999, a lumbar epidural steroid injection on April 10, 2001 and lumbar radiofrequency lesioning on June 18, 1999.

By decision dated April 25, 2001, the Office denied appellant's claim, stating that the evidence of record did not establish that appellant was disabled for work or suffered a loss of capacity to earn wages as a result of the accepted injury.

¹ Docket No. 97-2140 (issued January 14, 2000). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

By letter dated December 26, 2001, which was faxed to the Office on December 27, 2001, appellant requested reconsideration of the Office's decision and submitted additional evidence.

By letter dated August 23, 2002, appellant submitted another letter requesting reconsideration of the Office's decision. In his request, appellant stated that he was asking for "reconsideration for payment of [his] CA-7 from 1999 to the present" and that he was sending a copy of his physician's narrative as it relates to his case.

Appellant underwent additional radiofrequency lesioning on May 12, 2001.

In a progress note dated November 2, 2001, Dr. Gibson stated that appellant reported that his back was 50 percent better for the first four months of the epidural sites they did in April. He stated that appellant was beginning to have some return of his back pain, but his medications were controlling his symptoms with the exception of some increased muscle spasms. Dr. Gibson stated that appellant's neck was "doing great" and his neck pain was totally controlled by his medication.

In a report dated April 19, 2002, Dr. Gibson stated that appellant came in for a follow up of his cervical postoperative radiculopathy and low back pain secondary to an old herniated nucleus pulposus at L5-S1. He stated that appellant reported that he was doing well since his neck surgery, that appellant had good range of motion and that he rarely had any symptoms that the medication did not control. Dr. Gibson stated that appellant had daily chronic pain in his low back radiating down his leg in an L5-S1 pattern to the great toe with numbness along the lateral aspect of his left leg to about the knee. He stated that appellant's "back-and-leg" pain was mostly controlled with his medication and when his present regimen no longer controlled his symptoms, he responded very well to an occasional epidural steroid. Dr. Gibson stated that appellant used a cane for walking because his left leg gave way although that usually did not happen. He stated that he refilled appellant's medicines and would see him in three months for a follow up.

In a note dated July 25, 2002, Dr. Richard Rex Harris, a Board-certified orthopedic surgeon, stated that appellant wanted to transfer there from Virginia. He stated that he last saw appellant six years ago and he needed a copy of his records before he could proceed. Dr. Harris stated that appellant brought a list of his "med[icine]s" that he was on at the chronic pain clinic in Virginia which he would fill.

In a report dated July 26, 2002, the district medical adviser reviewed Dr. Gibson's April 19, 2002 report and stated that appellant had L5-S1 chronic pain (L5-S1 nerve root) in his back and left leg. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), page 424, he stated that the Grade 3 pain pursuant to Table 15-15 is 26 to 60 percent of the nerve, and pursuant to Table 15-18 the L5-S1 root had a

maximum of 5 percent loss of function due to sensory deficit or pain. He multiplied 60 percent by 5 percent to obtain a 3 percent permanent impairment of appellant's left lower extremity.

On August 12, 2002 the Office issued appellant an award for a three percent permanent impairment to his left leg.

By decision dated September 13, 2002, the Office denied appellant's request for reconsideration, stating that appellant's letter requesting reconsideration dated August 23, 2002 which was filed more than a year after the Office's April 25, 2001 decision was untimely and appellant did not show clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office erred in determining that appellant's request for reconsideration was not timely filed.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed the appeal with the Board on September 30, 2002, the only decision before the Board is the Office's September 13, 2002 decision, denying appellant's request for reconsideration.

In its September 13, 2002 decision, the Office stated that appellant's letter requesting reconsideration was dated August 23, 2002, and was not timely since it was filed more than a year after the Office's April 25, 2001 decision. However, the record contains appellant's first letter requesting reconsideration dated December 26, 2001 and faxed to the Office on December 27, 2001 which was filed within a year of the Office's April 25, 2001 decision. Appellant's letter requesting reconsideration dated December 26, 2001 was timely filed. The case must be remanded for the Office to address appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

The Board finds that appellant is not entitled to more than a three percent permanent impairment to his left lower extremity for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁵

² *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. § 8107 *et seq.*

⁴ 20 C.F.R. § 10.404.

⁵ *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

In this case, in his April 19, 2002 report, Dr. Gibson stated that appellant had daily chronic pain in his low back radiating down to his leg in an L5-S1 pattern to his great toe with numbness along the lateral aspect of his left leg to about the knee. He stated that appellant's back and leg pain is mostly controlled with medication and an occasional epidural steroid, and that appellant's leg sometimes gave way. Dr. Gibson stated that appellant uses a cane in case his leg gives way but that does not usually happen. In his July 16, 2002 report, the district medical adviser properly applied Dr. Gibson's findings to the A.M.A., *Guides* (5th ed. 2001), page 424, and found that appellant's Grade 3 pain equaled a 60 percent sensory deficit under Table 15-15 and his L5-S1 impaired nerve root equaled a 5 percent loss of function due to sensory deficit or pain. Multiplying 60 percent by 5 percent, he obtained a 3 percent permanent impairment to appellant's left lower extremity. The district medical adviser's use of the A.M.A., *Guides* was proper and his conclusions are rational. No other evidence of record shows that appellant had more than a three percent permanent impairment to his left lower extremity pursuant to the A.M.A., *Guides* (5th ed. 2001).

The September 13, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside, and the case remanded for further action consistent with this decision. The Office's August 12, 2002 decision is hereby affirmed.

Dated, Washington, DC
May 23, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member